CASE NO. 85-1277

IN THE SUPREME COURT OF THE UNITED STATES

THE SCHOOL BOARD OF NASSAU COUNTY, FLORIDA; and CRAIG MARSH, Individually and as Superintendent of Schools of Nassau County, Florida,

Petitioners,

---vs.---

GENE H. ARLINE,

Respondent.

BRIEF OF OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Tuberculosis is a handicap within the meaning of Title 29 U.S.C. 701 (Section 504, Rehabilitation Act of 1973).

2. Whether the receipt of Miniscule Federal Financial Aid by a public employer pursuant to 20 U.S.C. Section 237 is sufficient to invoke jurisdiction under Title 29 U.S.C. 701 et. seq. (Section 504 of the Rehabilitation Act of 1973).

3. Whether the School Board is immune under the Eleventh Amendment to the United States Constitution.

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CITATION TO OPINION BELOW

JURISDICTIONAL GROUNDS

STATUTES INVOLVED

(Respondent accepts Petitioner's presentation of the above sections.)

STATEMENT OF THE CASE

Respondent accepts Petitioners Statement of the Case, except with regard to the testimony of Marianne McEuen, M.D. Dr. McEuen did suggest, as Petitioner indicates, that Tuberculosis could be transmitted to others by breathing, coughing, sneezing, or other respiratory activity. It was her opinion, however, that Respondent could work with older children and adults, and that the risk of infection of those groups was negligible. At the time of Respondent's dismissal, Petitioner had available the recommendation of Dr. McEuen, which stated that Ms. Arline should not continue to teach third grade students because young children are "highly susceptible" to tuberculosis, and because of the possibility of Respondent suffering a relapse. Respondent has suffered three relapses of tuberculosis since her childhood.

REASONS FOR DENYING THE WRIT

ISSUE 1: WHETHER TUBERCULOSIS IS A HANDICAP WITHIN THE MEANING OF TITLE 29 U.S.C. 701 (Section 504, Rehabilitation Act of 1973).

(i) The issue is premature for decision by this Court

There is presently no judicial decision from the federal courts of appeals other than the decision below which directly addresses whether the term "handicapped individual" includes those afflicted by a contagious disease. The lack of the decisional law on this subject suggests several important reasons for the Court to delay its involvement. "One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on (federal law questions) among the federal court of appeals." Stern & Gressman, Supreme Court Practice, p. 265 (5th ed. 1971). Moreover, the Court benefits from hearing a wide variety of views of an issue. Respondent submits that, in order to allow time for the arguments on all sides to develop, the Court should exercise its discretion and deny the Writ.

There is no conflict among the lower federal courts on what constitutes a "handicapped individual" within section 504 of the Act. All courts have given effect to the plain meaning of the statutory test of 29 U.S.C. §706(7)(B), which allows any person who has "a physical or mental impairment which substantially limits one or more... major life activities" to seek redress under section 504. Petitioner concedes that the courts have construed the term "impairment" to encompass a wide variety of physical and mental afflictions (Pet. Br. at 10), and does not dispute the Respondent's affliction substantially limits her ability to work. Yet Petitioner's brief fails to provide case or statutory authority upon which the court below could justify a departure from clear statutory language and established legal principles. The absence of any such authority in Petitioner's brief for excluding certain "unpopular" afflictions from the coverage of the Rehabilitation Act is itself evidence that the

issue presented is premature for consideration by this Court. Respondent respectfully submits that the Court await further developments in the lower courts to determine whether Petitioner has presented an issue of national importance. See Stern & Gressman at 284.

(ii) The issue is of minor importance in the overall structure of the law.

As noted above, the question of what constitutes a "handicapped individual" is not a contentious one. In many cases, the parties simply stipulate to the issue. See, e.g. Strathie v. Dep't of Transporation, 716 F.2d 227, 231 (3d Cir. 1983) (hearing impaired bus driver); Bentivegna v. United States Dep't of Labor, 694 F.2d 688 (9th Cir. 1982) (diabetic construction worker.

Petitioner suggests that the issue of whether an individual who suffers from a contagious disease is "handicapped" is an important one because of the employer's interest in protecting the health and safety of employees and clients. (Pet. Br. at 15, 18) Although many of the cases arising under section 504 involve consideration of the employer's interests along with those of qualfied handicapped individuals, none suggest that this weighing of interests should take place when determining if the plaintiff is handicapped. In many Section 504 cases, once a plaintiff shows that an employer denied him employment because of his physical condition, the burden of persuasion then shifts to the employer to show that its requirements are sufficiently "job-related" to justify the denial. See Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983). See also 29 C.F.R. 1613.702 et seq. In other cases, after the plaintiff makes his prima facie case, the employer must then show that, despite its duty to make "reasonable accommodations" for "otherwise qualified" handicapped persons, such accommodations were impossible or would impose an undue hardship. See Southeastern Community College v. Davis, 442 U.S. 397, 60 L.Ed. 2d 980, 99 S.Ct. 2361 (1979); Strathie, supra. Clearly, the framers of the

Act did not intend that persons who are dismissed from employment because of disease should be denied such opportunities to challenge their employer's justifications in court. In enacting Section 504, Congress stressed the importance of the evenhanded treatment of handicapped individuals. Southeastern, 99 S.Ct. at 2369.

Petitioner contends that the 1978 Amendments to the Act concerning alcoholism and drugs indicate Congress' intent to exclude from Section 504 individuals who present "unavoidable health risks" because they are not "handicapped individuals." (Pet. Br. at 17.) Yet Congress has never indicated that such risks are to be considered when determining who is "handicapped." Courts typically analyze the risks faced by the handicapped individual and by others in their environment when determining whether program requirements are discriminatory, or when considering whether "reasonable accommodations" can be made. See New York State Assoc. for Retarded Children, Inc. v. Carey, 612 F.2d 644 (2d Cir. 1979) (plan to separate carriers of hepatitis B from other school children is discriminatory under 504 where health hazard not shown to be more than remote possibility); Strathie, supra (remand to determine whether accommodations to hearing-impaired bus driver could eliminate all appreciable risks to passengers' safety); Duran v. City of Tampa, 451 F.Supp. 955 (M.D. Fla. 1978) (refusal to hire because of epilepsy discriminatory under Section 504; Gladys J. v. Peraland Ind. School District, 520 F.Supp. 869 (S.D. Tex. 1981) (refusal to place schizophrenic in residential school nondiscriminatory under Section 504 because of "striking out aggressively" and other maldaptive behaviors). The holdings of the above cases were reached after careful consideration of suggested measures to protect the health and safety of handicapped individuals and all those with whom they come into contact. To suggest, as Petitioner does, that Congress in 1978 sought to remove such protections from individuals who present potential risks to others due to their handicap, is to ignore not only the purposes of the Rehabilitation Act, but established case law as well.

(iii) Whether or not the decision below is correct, Petitioner's argument is witout merit.

In its brief, Petitioner distorts the holding of the Eleventh Circuit Court of Appeals with respect to "reasonable accommodations." According to Petitioner, the court below held that even if Respondent were not "otherwise qualified" for her teaching position, her employer might nevertheless be required to accommodate her. (Pet. Br. at 15.) From this premise, Petitioner concludes that the Court of Appeals' concept of reasonble accommodation would require employers to unreasonably compromise the safety of others. (Pet. Br. at 18).

Petitioner has misinterpreted the holding of the Eleventh Circuit and attributed to it a significance well beyond its intended limits. The court below did not hold that the School Board must compromise the health of employees or students in order to accommodate Respondent. It simply remanded for fact-finding to determine whether she was "otherwise qualified" and, if so, whether reasonable accommodations could be made. Arline v. School Board of Nassau County, 772 F.2d 759, 765 (11th Cir. 1985). Although the court did suggest in dicta that reasonable accommodations might include placement "in another position teaching less susceptible individuals," the court did not suggest that, under those circumstances, Respondent need not be "otherwise qualified." By raising the possibility of assigning Respondent to another position, the Eleventh Circuit merely encouraged a flexible approach to accommodating a qualified, handicapped individual. This dicta is consistent with that of the Supreme Court; see Southeastern, 99 S.Ct. at 2370 ("situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory").

Petitioner also contends that "whether an individual is to be considered 'qualified' under the Act depends on whether such individual can, with or without reasonable accommodation," perform the essential functions without endangering health or safety (citing Prewitt, supra) (Pet. Br. at 12-13; emphasis added). Prewitt, however, merely affirms the established proposition that an employer need not hire a handicapped

individual who cannot perform without accommodation. 662 F.2d at 307. Nowhere does the Prewitt court (or any court) state that a handicapped individual must be qualified in all respects even without reasonable accommodations.

Petitioner's arguments as to whether Respondent is "otherwise qualified" and as to whether "reasonable accommodations" can be made raise issues of fact not reached by the Court of Appeals. These arguments should be addressed to the district court on remand.

(iv) The court below reached the correct result after full consideration of the issues.

The Court of Appeals decided that Respondent was a "handicapped individual" after finding that "neither the regulations nor the statutory language give any indication that chronic contagious diseases are to be excluded from the definition of 'handicap'" and that "there is not a scintilla of evidence that Congress had any intention of (creating an exemption)." 772 F.2d at 764. The court also recognized that creating an exemption for those afflicted with contgious disease would defeat Congress' intent to "encourage recipients of federal funds to make decisions about the employability of those with physical or mental impairments only after a careful weighing of the costs involved in accommodating the tasks at issue to their capabilities." Id.

This refusal to carve a judicial exemption into the nondiscrimination provision of the Rehabilitation Act of 1973 is certainly consistent with the pronouncements of the legislature. In enacting and amending Section 504, Congress "made a commitment to the handicapped, that, to the maximum extent possible they shall be fully integrated into the mainstream of life in America." S.Rep. No. 890, 95th Cong., 2d Sess. 39 (1978) (emphasis added).

Petitioner argues that the Act requires an employer to "accommodate the requirements of a job to a handicapped

individual's abilities" and implies that unless an employee's abilities are the basis of the employer's action, the employer has no obligations under Section 504. (Pet. Br. at 13-14.) This reading of the Act is contrary to legislative history, which consistently demonstrates congressional intent to prevent such narrowing constructions of Section 504. See S.Rep. No. 1297, 93rd Cong., 2d Sess., reprinted in 4 U.S. Code Cong. & Ad. News 6414 (1974) (definition of "handicapped individual" expanded to reach those persons outside the employment arena and to reach those not involved with vocational rehabilitational programs.)

There is an unbroken line of case authority which supports the Eleventh Circuit's reading of congressional intent. In Consolidated Rail Corp. v. Dorrane, 104 S.Ct. 1248, 1255 (1984), the Supreme Court noted the remidial nature of the Rehabilitation Act and held that its provisions are to be accorded and broad construction to effectuate the Act's purposes. The court in Strathie, supra, noted that broad judicial deference to administrators would undermine Congress' intent to sterotypes or generalizations not deny handicapped individuals equal access to federally-funded programs. See also Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 982) (Act mandates "significant accommodations for the capabilities and conditions of the handicapped") (emphasis added).

The result reached by the Eleventh Circuit was both fair and farsighted. If the court had followed Petitioner's recommendation and interpreted Section 504 to exclude persons with contagious diseases, its precedent would potentially have led to massive litigation over what constitutes "contagious." Meanwhile, the focus of program administrators and courts would have been directed away from the key issue: whether the qualified handicapped individual can be reasonably accommodated to work or learning environment.

ISSUE 2: WHETHER THE RECEIPT OF FEDERAL FINANCIAL AID BY A PUBLIC EMPLOYER PURSUANT TO 20 U.S.C. SECTION 237 IS SUFFICIENT TO INVOKE JURISDICTION UNDER TITLE 29 U.S.C. 701 et seq. (Section 504 of the Rehabilitation Act of 1973).

(i) The issue is premature for decision by this Court.

As with respect to the definition of "handicapped individual" under section 504, Petitioner proposes an interpretation of "federal financial assistance" under section 504 which as of yet has no support in any federal court of appeals. By suggesting that federal aid might reach such a miniscule level such as to no longer constitute "federal financial assistance" under section 504, Petitioner presents to the Court a novel and perhaps interesting issue. However, Respondent submits that the Court should reserve its jurisdiction for those issues which the lower courts have had an opportunity to address and which have since given rise to important legal problems. See Stern & Gressman, Supreme Court Practice, at 284.

Petitioner contends that, by holding a recipient of impact aid to be covered by section 504, the Court of Appeals initiated a "dramatic expansion" of the concept of federal financial assistance away from previous decisions. (Pet. Br. at 19.) Yet the significance which Petitioner attaches to the holding below is contrived. No court has recognized a theory by which a certain amount of federal funding would be insufficient to give rise to section 504 coverage. The Court of Appeals' holding would only have been "dramatic" if the court had departed from established legal principles and recognized such a theory.

Because the court recently clarified the meaning of "federal financial assistance" under section 504 of the Rehabilitation Act in Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), ruling on this question of law today would be duplicative and wasteful of the Court's limited resources. In Darrone, 465 U.S. 624 (1984), the Court held that an action under section 504 must

be brought against the specific "program or activity" receiving federal funds, but that there is no implicit requirement under section 504 that the funds be "primarily intended" to promote employment. This holding indicates that attempts to read limitations into the meaning of the term "federal financial assistance" which are not apparent on its face will be rejected. See Arline, 772 F.2d at 76 n.9. Since the language of section 504 provides no foundation for an implicit requirement of "something more than miniscule" aid, Respondent submits that the Court should refrain from exercising its discretionary jurisdiction in this case.

(ii) Whether or not the decision below is correct, Petitioner's argument is without merit

Petitioner relies on the Supreme Court's holding in Grove City College v. Bell, 465 U.S. 555 (1984), for the proposition that funds earmarked for one program which find their way into a budget governing a "separate and distinct" program do not give rise to section 504 coverage of the latter program. (Pet. Br. at 19-20.) Regardless of whether Petitioner's interpretation is correct, Grove City is inapplicable to the present factual circumstances. The Court in Grove City carefully distinguished nonearmarked direct grants (such as the impact aid in the present case) from the grants of financial aid to students which were under its consideration. Grove City, 104 S.Ct. at 1221.

Despite Petitioner's repeated insistence that the "program-specific" requirement of Grove City and Darrone precludes section 504 coverage in this case, Petitioner fails to delinqate the specific program in which the impact aid was directed. Petitioner suggests that impact aid is "compensatory" in purpose and therefore not federal financial assistance at all; however, this contention provides scarce support for its argument that Respondent was unconnected with the specific program receiving federal assistance.

(iii) The court below reached the correct result after full consideration of the issues.

The Eleventh Circuit correctly concluded that the present case does not fall within the line of cases involving obligatory payments made by the federal government as market participant. The case of Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984), cited by Petitioner, succinctly states the rule that when the federal government compensates an entity for goods or services provided, such expenditures constitute "federal financial assistance" only when a subsidy is involved. This distinction between obligatory payments and subsidies has also been recognized by the Supreme Court. In Darrone, supra, the Court noted that, in light of government payments in excess of fair market value, federal financial assistance had been awarded. 104 S.Ct. at 1255 n.19. In the present case, the federal government was clearly under no obligation to deliver impact aid to Petitioner; by providing such a subsidy, it clearly placed Petitioner wtihin Section 504 coverage.

The Eleventh Circuit's holding that the relevant "program" with regard to nonearmarked general revenue funds was the entire school district, was consistent with statutory and case law. The legislative history of section 504 indicates that Congress intended to provide the most assistance and protection for the handicapped that the expenditure of federal dollars could provide. See Cong. Rec. 5880-83 (1973) (statement of Senator Cranston). Although there is limited case law on the subject of nonearmarked funding and section 504's "program-specific" requirement, at least one court has held that where the plaintiff's salary is paid from the same source into which nonearmarked federal funds are deposited, plaintiff's program is presumed to have received "federal financial assistance" within the meaning of section 504. Bradford v. Iron County C-4 School District, 36 FEP Cases 1296, 1299 (E.D. Mo. 1984) (plaintiff held to have participated in program covered by section 504 where defendant unable to show that program at issue did not utilize federal funds). To require Respondent to trace federal funds through Petitioner's general account would impose an "impossible

burden of tracing money that is virtually untraceable" upon the aggrieved party. 772 F.2d at 763. Such a result would hardly comport with the intent of Congress to maximize protections for the handicapped.

ISSUE 3: WHETHER THE SCHOOL BOARD IS IMMUNE UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

(i) Petitioner's argument is wholly without merit.

In support of its contention that a district school board in Florida is a direct branch of the State of Florida, Petitioner cites Adkins v. Duval County School Board, 511 F.2d 690 (5th Cir. 1975). In Adkins, the court described the localized funding scheme for school boards in Florida and, unable to distinguish a Florida school board was not a "person" within the meaning of section 1983. In Campbell v. Gadsden County District School Board, 511 F.2d 690 (5th Cir. 1976), also cited by Petitioner, the court stated that "our analysis (in Adkins) of the nature of Florida school boards in the context of determining their similarity to municipalities is sufficient to convince us that they are not the type of entities which are sheltered by the Eleventh Amendment." Petitioner cites no cases which indicate that Florida school boards are to be treated as the state for purposes of the Eleventh Amendment, nor does it provide any support for its contention that this issue is a "question of fact" which must be resolved on a case-by-case basis. (Pet. Br. at 24.) It is well-established that locally-funded governmental entities, such as Petitioner, are not entitled to Eleventh Amendment immunity. Edelman v. Jordan, 415 U.S. 651 (1974). Since Petitioner provides no basis in law or fact for departing from this principle in the present case, Respondent submits that the Court should deny the writ of certiorari.

CONCLUSION

There is currently no legal authority, express or implied, for the narrowed construction of section 504 which Petitioner

proposes. The Court should decline to exercise its discretionary jurisdiction so that the issues presented by Petitioner may be further tested and developed in the lower courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition was furnished by U.S. Mail to Brian T. Hayes, 245 E. Washington Street, Monticello, Florida 32344; and to JOHN D. CARLSON, 1030 East Lafayette Street, Tallahassee, Florida 32301, this 26 day of February, 1986.

GEORGE R. RAHDERT, ESQUIRE